

AMENDED IN ASSEMBLY AUGUST 21, 2006

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SENATE BILL

No. 1208

Introduced by Senator Ortiz

(Principal coauthors: Assembly Members Jerome Horton and Koretz)

(Coauthors: Assembly Members Jones and Lieber)

January 26, 2006

An act to add Section 22964 to, and to repeal and add Section 22963 of, the Business and Professions Code, to amend Section 308.1 of the Penal Code, and to repeal Section 30101.7 of the Revenue and Taxation Code, relating to tobacco products.

LEGISLATIVE COUNSEL'S DIGEST

SB 1208, as amended, Ortiz. Tobacco products.

(1) Existing law, the Cigarette and Tobacco Products Tax Law, requires every distributor of cigarettes to pay taxes, as prescribed, on the distribution of cigarettes. In addition to the requirement to pay taxes on the distribution of cigarettes, existing law also requires distributors and wholesalers of cigarette and tobacco products to be licensed by the State Board of Equalization. Existing federal law, known as the Jenkins Act, requires any person that sells or transfers, in interstate commerce, cigarettes into a state that taxes the sale or use

of cigarettes to file and report specified information with the tobacco tax administrator of that state.

Existing law prohibits, except under specified circumstances, a retail sale of cigarettes that is not a face-to-face sale, as defined, and prohibits distribution of tobacco products through the mail. Existing law exempts a person from the face-to-face sale restriction, if that person has paid all applicable state taxes and is in compliance with the federal Jenkins Act.

This bill would enact substantially similar provisions relating to tobacco products, including, but not limited to, cigars and pipe tobacco. The bill would, for cigarettes, as defined, repeal the face-to-face sale requirement, and the related tax reporting provisions, would repeal the prohibitions against distribution through the mail, and would, instead, with certain exceptions, prohibit shipping or transporting of cigarettes to persons in California, and would establish criminal and civil penalties for violation of this prohibition.

(2) Existing law prohibits the offer, sale, distribution, or importation of a tobacco product known as “bidis” or “beedies,” as defined, unless it is sold or intended for sale in business establishments that exclude minors.

This bill would amend the definition of “bidis” or “beedies” to include any product that is marketed and sold as “bidis” or “beedies” and would clarify that persons who violate this prohibition are subject to both criminal and civil liability.

(3) By changing the definition of related crimes, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. The Legislature finds and declares that the
2 shipment of cigarettes sold via the Internet or by telephone or by
3 mail order to residents of this state poses a serious threat to

1 public health, safety, and welfare, and to the economy of the
2 state. The Legislature also finds that when cigarettes are shipped
3 directly to a consumer, adequate proof that the purchaser is of
4 legal age cannot be obtained by the vendor, thereby enabling
5 sellers of cigarettes to evade provisions of law designed to
6 prevent sales to minors. It is also the Legislature's finding that by
7 preventing shipment of cigarettes directly to consumers, the state
8 will be better able to measure and monitor cigarette consumption
9 and to better determine the public health and fiscal consequences
10 of smoking. The Legislature further finds that existing penalties
11 for cigarette bootlegging are an inadequate deterrent.

12 SEC. 2. Section 22963 of the Business and Professions Code
13 is repealed.

14 SEC. 3. Section 22963 is added to the Business and
15 Professions Code, to read:

16 22963. (a) It is unlawful for any person engaged in the
17 business of selling or distributing cigarettes to ship or cause to be
18 shipped any cigarettes to any person in this state who is not any
19 of the following:

20 (1) Licensed pursuant to Division 8.6 (commencing with
21 Section 22970).

22 (2) An export warehouse proprietor pursuant to Chapter 52 of
23 the Internal Revenue Code (26 U.S.C. Sec. 5701 et seq.).

24 (3) An operator of a customs bonded warehouse pursuant to
25 Section 1311 or 1555 of Title 19 of the United States Code.

26 (4) A person who is an officer, employee, or agent of the
27 federal government, or of this state or of a department, agency,
28 instrumentality, or political subdivision of the federal
29 government or this state, when the person is acting in accordance
30 with his or her official duties.

31 (b) It is unlawful for any common or contract carrier to
32 knowingly transport cigarettes to any person in this state
33 reasonably believed by the carrier to be other than a person
34 described in subdivision (a). It is unlawful for any other person to
35 knowingly, or with reason to know, transport cigarettes to any
36 person in this state, other than a person described in subdivision
37 (a), except that this subdivision shall not be construed to prohibit
38 a person other than a common *or contract* carrier from
39 transporting 800 or fewer cigarettes at any one time to any adult
40 in this state.

1 (c) When a person engaged in the business of selling or
2 distributing cigarettes ships or causes to be shipped any cigarettes
3 to any person in this state, other than in the cigarette
4 manufacturer's original container or wrapping, the container or
5 wrapping shall be plainly or visibly marked with the term
6 "cigarettes."

7 (d) Notwithstanding any other provision of this division, upon
8 discovery by the State Board of Equalization or a law
9 enforcement agency of any cigarettes that have been, or are
10 being, shipped or transported in violation of this section, the
11 board or the law enforcement agency may seize and take
12 possession of the cigarettes. Any cigarettes seized by a law
13 enforcement agency shall be delivered to the board, or its
14 designee, within seven days, unless the cigarettes will be
15 destroyed by that law enforcement agency, or unless the
16 cigarettes are otherwise required to be used as evidence in an
17 administrative, criminal, or civil proceeding, or as part of an
18 ongoing law enforcement operation. Any cigarettes seized by the
19 board or delivered to the board by a law enforcement agency
20 shall be deemed forfeited and the board shall comply with
21 procedures set forth in Chapter 7.5 (commencing with Section
22 30435) of Part 13 of Division 2 of the Revenue and Taxation
23 Code.

24 (e) (1) A violation of this section is a misdemeanor and shall
25 be subject to the following penalties:

26 (A) Upon the first violation, a fine of not more than one
27 thousand dollars (\$1,000).

28 (B) Upon the second violation, a fine of not more than five
29 thousand dollars (\$5,000) and imprisonment not to exceed three
30 months.

31 (C) Upon the third violation or subsequent violations, a fine of
32 not more than twenty-five thousand dollars (\$25,000) and
33 imprisonment not to exceed six months.

34 (2) In addition to the criminal penalty, the Attorney General,
35 district attorney, or city attorney may bring a civil action against
36 any person, firm, corporation, or other entity that violates this
37 section. If a court determines that this section has been violated,
38 the court shall assess civil penalties not to exceed five thousand
39 dollars (\$5,000) per violation, plus the costs of investigating and

1 prosecuting the action, including expert fees, reasonable
2 attorney's fees, and court costs.

3 (f) For the purposes of this section, "cigarette" has the same
4 meaning as in paragraph (3) of subdivision (a) of Section
5 30165.1 of the Revenue and Taxation Code and implementing
6 regulations.

7 SEC. 3.5. Section 22964 is added to the Business and
8 Professions Code, to read:

9 22964. (a) The distribution or sale of tobacco products
10 directly or indirectly to any person under the age of 18 years
11 through the United States Postal Service or through any other
12 public or private postal or package delivery service at locations,
13 including, but not limited to, public mailboxes and mailbox
14 stores, is prohibited.

15 (b) Any person selling or distributing tobacco products
16 directly to a consumer in the state through the United States
17 Postal Service or by any other public or private postal or package
18 delivery service, including orders placed by mail, telephone,
19 facsimile transmission, or the Internet, shall comply with the
20 following provisions:

21 (1) (A) Before enrolling a person as a customer or distributing
22 or selling tobacco products through any of these means, the
23 distributor or seller shall attempt to match the name, address, and
24 date of birth provided by the customer to information contained
25 in records in a database of individuals whose age has been
26 verified to be 18 years or older by reference to an appropriate
27 database of government records kept by the distributor, a direct
28 marketing firm, or any other entity. The distributor or seller shall
29 also verify that the billing address on the check or credit card
30 offered for payment by the purchaser matches the address listed
31 in the database.

32 (B) If the distributor or seller is unable to verify that the
33 purchaser is 18 years of age or older pursuant to subparagraph
34 (A), he or she shall require the customer to submit an
35 age-verification kit consisting of an attestation signed by the
36 customer that he or she is 18 years of age or older and a copy of
37 a valid form of government identification, which includes a
38 driver's license, state identification card, passport, an official
39 naturalization or immigration document, such as an alien
40 registration receipt card (commonly known as a "green card") or

1 an immigrant visa, or military identification. The distributor or
2 seller shall also verify that the billing address on the check or
3 credit card provided by the consumer matches the address listed
4 in the form of government identification.

5 (2) The distributor or seller shall require payment for the
6 purchase of any tobacco products to be made by personal check
7 of the purchaser or the purchaser's credit card. No money order
8 or cash payment shall be received or permitted. The distributor or
9 seller shall submit to each credit card acquiring company with
10 which it has credit card sales identification information in an
11 appropriate form and format so that the words "tobacco product"
12 may be printed in the purchaser's credit card statement when a
13 purchase of tobacco products is made by credit card payment.

14 (3) The distributor or seller shall make a telephone call after 5
15 p.m. to the purchaser confirming the order prior to shipping the
16 tobacco products. The telephone call may be a person-to-person
17 call or a recorded message. The distributor or seller is not
18 required to speak directly with a person and may leave a message
19 on an answering machine or by voice mail.

20 (4) The distributor or seller shall deliver the tobacco products
21 to the purchaser's verified billing address on the check or credit
22 card used for payment. No delivery described under this section
23 shall be permitted to any post office box.

24 (c) Notwithstanding subdivisions (a) and (b), if a distributor or
25 seller complies with all of the requirements of this section and a
26 minor obtains tobacco products by any of the means described in
27 subdivision (b), the seller or distributor is not in violation of this
28 section.

29 (d) For the purposes of the enforcement of this section
30 pursuant to Section 22958, the acts of the United States Postal
31 Service or other common carrier when engaged in the business of
32 transporting and delivering packages for others, and the acts of a
33 person, whether compensated or not, who transports or delivers a
34 package for another person without any reason to know of the
35 package's contents, are not unlawful and are not subject to civil
36 penalties.

37 (e) (1) For the purposes of this section, "tobacco products"
38 includes any form of smoking tobacco, cigars, pipe tobacco,
39 smokeless tobacco, chewing tobacco, snuff, or any other article
40 or product containing tobacco, but does not include cigarettes as

1 defined in subdivision (a) of Section 30165.1 of the Revenue and
2 Taxation Code and implementing regulations.

3 (2) For the purposes of this section, a “distributor” is any
4 person or entity, within or outside the state, who agrees to
5 distribute tobacco products to a customer within the state. The
6 United States Postal Service or any other public or private postal
7 or package delivery service are not distributors within the
8 meaning of this section.

9 (3) For the purpose of this section, a “seller” is any person or
10 entity, within or outside the state, who agrees to sell tobacco
11 products to a customer within the state. The United States Postal
12 Service or any other public or private postal or package delivery
13 service are not sellers within the meaning of this section.

14 (f) A district attorney, city attorney, or the Attorney General
15 may assess civil penalties against any person, firm, corporation,
16 or other entity that violates this section, according to the
17 following schedule:

18 (1) A civil penalty of not less than one thousand dollars
19 (\$1,000) and not more than two thousand dollars (\$2,000) for the
20 first violation.

21 (2) A civil penalty of not less than two thousand five hundred
22 dollars (\$2,500) and not more than three thousand five hundred
23 dollars (\$3,500) for the second violation.

24 (3) A civil penalty of not less than four thousand dollars
25 (\$4,000) and not more than five thousand dollars (\$5,000) for the
26 third violation within a five-year period.

27 (4) A civil penalty of not less than five thousand five hundred
28 dollars (\$5,500) and not more than six thousand five hundred
29 dollars (\$6,500) for the fourth violation within a five-year period.

30 (5) A civil penalty of ten thousand dollars (\$10,000) for a fifth
31 or subsequent violation within a five-year period.

32 SEC. 4. Section 308.1 of the Penal Code is amended to read:

33 308.1. (a) Notwithstanding any other provision of law, no
34 person shall sell, offer for sale, distribute, or import any tobacco
35 product commonly referred to as “bidis” or “beedies,” unless that
36 tobacco product is sold, offered for sale, or intended to be sold in
37 a business establishment that prohibits the presence of persons
38 under 18 years of age on its premises.

39 (b) For purposes of this section, “bidis” or “beedies” means
40 any of the following:

1 (1) A product containing tobacco that is wrapped in temburni
2 leaf (*diospyros melanoxylon*) or tendu leaf (*diospyros exculpra*).

3 (2) A product that is marketed and sold as “bidis” or
4 “beedies.”

5 (c) Any person who violates this section is guilty of a
6 misdemeanor and is also subject to a civil action brought by the
7 Attorney General, a city attorney, county counsel, or district
8 attorney for an injunction and a civil penalty of up to two
9 thousand dollars (\$2,000) per violation. This subdivision does
10 not affect any other remedies available for a violation of this
11 section.

12 SEC. 5. Section 30101.7 of the Revenue and Taxation Code
13 is repealed.

14 SEC. 6. No reimbursement is required by this act pursuant to
15 Section 6 of Article XIII B of the California Constitution because
16 the only costs that may be incurred by a local agency or school
17 district will be incurred because this act creates a new crime or
18 infraction, eliminates a crime or infraction, or changes the
19 penalty for a crime or infraction, within the meaning of Section
20 17556 of the Government Code, or changes the definition of a
21 crime within the meaning of Section 6 of Article XIII B of the
22 California Constitution.